

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
RICHARD D. BRIGHT)	FOIA Control No. 21-127
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 2002

Released: February 19, 2002

By the Commission:

1. The Commission has before it an application for review¹ filed by Dr. Richard D. Bright (Dr. Bright) seeking review of the decision of the Wireless Telecommunications Bureau (Bureau) granting in part and denying in part his Freedom of Information Act (FOIA) request for documents concerning a communications tower to be built in Ellicott City, Maryland.² For the reasons stated below, we deny the application for review.

Background

2. This FOIA request arises from a proposal by the State of Maryland to construct an emergency communications tower on the property of the District Court in Ellicott City (the District Court site). To construct the tower, Maryland is required to conduct an environmental review to determine whether the tower fits within the enumerated circumstances that the Commission has found may significantly affect the environment.³ As part of this environmental review, Maryland was required to initiate the section 106 review pursuant to the National Historic Preservation Act (NHPA).⁴ The Maryland State Historic Preservation Officer (SHPO) advised Maryland that the proposed construction would have an adverse effect on various historic properties including the Ellicott City historic district. The Commission then directed Maryland to initiate the negotiation process with the SHPO and other interested parties to develop mitigation measures to address the adverse effects or to consider alternative sites.

3. During the course of the negotiations among the parties, a member of the Commission's staff prepared a one-page memorandum concerning whether an alternate proposed site approximately one half mile away (the Campus Site) would be a reasonable alternative to the original site.⁵ The Public Safety and Private Wireless Division (PSPWD) then prepared a fuller, eight-page memorandum and

¹ Letter from Dr. Richard D. Bright to Office of General Counsel (June 6, 2001) (App. for Rev.)

² Letter from Jeffrey S. Steinberg, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau to Dr. Richard D. Bright (May 16, 2001) (Bureau Decision).

³ See 47 C.F.R. § 1.1307(a).

⁴ See 47 C.F.R. § 1.1307(a)(4).

⁵ Electronic mail (e-mail) from Salomon Satche to Anne Wypijewski and Zenji Nakazawa (Apr. 2, 2001) (regarding the Ellicott City tower).

recommendation to the Commercial Wireless Division (CWD).⁶ In a teleconference with the parties, CWD told the parties that it concurred in the staff's recommendation that the tower be built at the District Court site, and stated the reasons for its decision.

4. Dr. Bright then filed a FOIA request for the analysis of the alternative tower site.⁷ The Bureau granted in part Dr. Bright's request, releasing most of the eight-page memorandum but withholding portions of it, as well as most of the staff's one-page memorandum, pursuant to the attorney client and deliberative process privileges embodied in FOIA Exemption 5, 5 U.S.C. § 552(b)(5).⁸

5. Dr. Bright sought review of the Bureau Decision.⁹ He argued that the redacted portions of the documents should be released because under NHPA's implementing regulations,¹⁰ the Commission is required to provide sufficient documentation for the public to understand its tower siting decision. Dr. Bright also simultaneously filed a letter with CWD reiterating his belief that Section 106 requires further explanation of the tower siting decision.¹¹ In response to Dr. Bright's letter to WTB/CWD, the Bureau issued a document that provided a written statement of the reasons for the tower siting determination.¹²

Discussion

6. Upon review, we find no reason to disturb the Bureau's decision to withhold portions of the two documents. At the outset, we note that the redacted sections clearly fall within the parameters of FOIA Exemption 5's deliberative process privilege.¹³ The two documents are predecisional documents that were an integral part of the decisionmaking process that led to the staff's acceptance of the proposal to build the tower at the District Court site, and the subsequent issuance of the June 26 Siting Letter. The redacted portions of the documents involve the staff's preliminary opinions and recommendations concerning the two tower sites. Release of these portions of the documents would discourage candid discussions within the agency prior to the formulation of agency decisions.¹⁴ Further, the two partially withheld documents do not constitute the Bureau's decision on the siting of the Ellicott City tower. Rather, the staff decision and all of the technical and other bases for it were stated during the teleconference with the parties, and were memorialized in the June 26 Siting Letter.

7. We are not persuaded by Dr. Bright's argument that the NHPA implementing regulations require release of the redacted portions of the documents under the FOIA.¹⁵ The Advisory Council on

⁶ Memorandum from Ramona E. Melson, Deputy Chief, PSPWD, to William W. Kunze, Chief, CWD (Apr. 13, 2001) (PSPWD Memo).

⁷ Letter from Dr. Richard D. Bright to Dan Abeyta, Wireless Telecommunications Bureau (Apr. 20, 2001) (FOIA Request).

⁸ Bureau Decision, *supra*.

⁹ App. for Rev., *supra*.

¹⁰ 36 C.F.R. § 800.11.

¹¹ Letter from Dr. Richard D. Bright to Jeffrey S. Steinberg, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau (June 6, 2001).

¹² Letter to Consulting Parties from CWD (June 26, 2001) (June 26 Siting Letter) (providing reasons in writing for the siting decision).

¹³ See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

¹⁴ Sears, Roebuck, 421 U.S. at 150-51; Ethyl Corp. v. United States Environmental Protection Agency, 25 F.3d 1241, 1248 (4th Cir. 1994) (quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)) (Exemption 5 "protects 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.'").

¹⁵ App. for Rev. *citing* 36 C.F.R. § 800.11(a).

Historic Preservation (ACHP) regulations require that in Section 106 proceedings an agency must provide “sufficient documentation to enable any reviewing parties to understand [the] basis” of the siting decision.¹⁶ The documentation required by the regulations¹⁷ was made available to the parties to the Ellicott City tower proceeding and to the ACHP in the June 26 Siting Letter. The access afforded by these regulations does not require agencies to make available privileged, pre-decisional information that is protected under FOIA Exemption 5.¹⁸

8. IT IS ORDERED that Dr. Richard D. Bright’s application for review IS DENIED. Dr. Bright may seek judicial review of the denial in part of his FOIA request pursuant to 5 U.S.C. § 552(a)(4)(B).

9. The officials responsible for this action are the following Commissioners: Chairman Powell, Commissioners Abernathy, Copps, and Martin.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

¹⁶ See 36 C.F.R. §§ 800.6(a)(3); 800.11(a).

¹⁷ See 36 C.F.R. § 800.11(e). See generally Lesser v. City of Cape May, 110 F. Supp. 2d 303, 326-28 (D.N.J. 2000) (describing the documentation requirements of the NHPA implementing regulations).

¹⁸ See 36 C.F.R. § 800.11(c)(3) (“Other Federal laws . . . may limit public access to information concerning an undertaking and its effects on historic properties. Where applicable, those authorities shall govern public access to the information developed in the section 106 process . . .”).